IN THE

Supreme Court of the United States

OCTOBER TERM, 1901.

STATE OF MINNESOTA.

vs.

ETHAN ALLEN HITCHCOCK, Secretary of the Interior, and BINGER HERMANN, Commissioner of the General Land Office.

BRIEF AND ARGUMENT FOR COMPLAINANT.

STATEMENT OF FACTS.

This is a suit in equity by the State of Minnesota to enjoin the Secretary of the Interior and the Land Commissioner from selling any part of Sections 16 and 36 of the lands formerly included in the unceded Indian country of the Chippewa Indians.

The State claims these lands as school lands. The Secretary of the Interior claims the right to sell them under the act of Congress of January 14, 1889 (25 Statutes, page 642).

The solution of this question depends upon the proper construction of the Acts of Congress accepted by the territory and State of Minnesota reserving Sections 16 and 36 in the territory of Minnesota for the purpose of being applied to schools in said territory and in the state of Minnesota.

By the organic act of Minnesota entitled "An act to establish the territorial government of Minnesota," approved March 3, 1849, (9 Stat. 403), it was, among other things, enacted by Section 18 thereof, "that when the lands in said territory shall be surveyed under the direction of the government of the United States preparatory to bringing the same into market, the sections numbered 16 and 36 of each township in said territory shall be, and the same are hereby reserved for the purpose of being applied to schools in said territory and in the state and territories hereafter to be erected out of the same."

On February 26, 1857 (11 Stat. 166), an Act of Congress was approved authorizing the formation of a state government for Minnesota. Section 5 of the act, so far as applicable to this question, is as follows:

"And be it further enacted, That the following propositions be, and the same are hereby, offered to said convention of the people of Minnesota for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory on the United States and upon the said state of Minnesota, to-wit:

"First, That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands, equivalent thereto and as contiguous as may

be, shall be granted to said state for the use of schools."

The people of said Territory, proceeding under said act of Congress, authorizing the formation of a State government, adopted, on the 13th day of October, 1857, a Constitution, in which, by Section 3 of Article 2 thereof, the foregoing proposition, as to school lands was duly accepted in the following language:

"The propositions contained in the act of Congress entitled 'An Act to authorize the people of the Territory of Minnesota to form a constitution and State government, preparatory to their admission into the Union on equal footing with the United States,' are hereby accepted, ratified, and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordained that this State shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title to said soil to bona fide purchasers thereof; and no tax shall be imposed on lands belonging to the United States, and in no case shall non-resident proprietors be taxed higher than residents."

That by an act of Congress entitled, "An act for the admission of Minnesota into the Union," approved May 11, 1858 (11 Stat. 285), the said State was admitted into the Union on an equal footing with the original States in all respects whatever. That by said act of Congress it was, among other things, recited and enacted as follows:

"Whereas, an act of Congress was passed February twenty-sixth, eighteen hundred and fifty-seven, entitled 'An act to authorize the people of the Territory of Minnesota to form a constitution and state government preparatory to their admission into the Union on an equal footing with the original States;'

and, whereas, the people of said Territory did, on the twenty-ninth day of August, eighteen hundred and fifty-seven, by delegates elected for that purpose, form for themselves a constitution and state government, which is republican in form, and was ratified and adopted by the people at an election held on the thirteenth day of October, eighteen hundred and fifty-seven, for that purpose; therefore,

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever."

On February 26, 1856 (Laws of Minn. for 1856, page 368), the legislature of the territory of Minnesota sent a memorial to Congress for the relief of settlers upon the school lands. It will be remembered that in the act creating the territory of Minnesota, Sections 16 and 36 were reserved for the purpose of being applied to the schools. This act was passed in 1849. Thereafter it was found when the surveys came to be made, that there were certain settlers upon portions of Sections 16 and 36, and town sites had been laid out under the act of Congress, and lots sold covering portions of these sections. Thereupon and on the 26th day of February, 1856, the territorial legislature sent a memorial to Congress, as follows:

"To the Honorable the Senate and House of Representatives of the United States in Congress Assembled: The Memorial of the Legislative Assembly of the Territory of Minnesota respectfully represents:

"That under the provisions of the act of Congress, extending the provisions of the preëmption law of

1841, over the unsurveyed lands of Minnesota, many of our settlers have heavy investments, both of money and labor, in the opening of farms, erection of buildings, and the laying out and improving of town sites (lots in which said town sites were frequently transferred before the Government survey, at high prices, to the occupants thereof), who were found when the Government survey was made, to be upon the school sections, and that the said settler had no means of ascertaining previous to the survey, where the school sections would come.

"That it is a great injustice and hardship to compel such persons to re-purchase or lose entirely the improvements and homes, made by themselves in good faith, in the expectation of preëmpting or entering them according to the provisions of the statute. Therefore, your Memorialists would respectfully request your Honorable Body to pass an act, giving such persons in this Territory as have, previously to the Government survey, settled upon the school sections (and have otherwise the right of preëemption), the right to preëmpt the same, as other Government lands are preëmpted. And also providing for the entry of the town sites in this Territory, which are on school sections and were occupied as such, previous to the Government survey, as other town sites upon unoffered Government lands are entered.

"And also allowing the County Commissioners of the county in which such lands may be situate, to enter in lieu thereof, for the benefit of the school fund of the township in which such land so as aforesaid settled or occupied may be, and without charge, an equal amount of such surveyed lands, subject either to private entry or preëmption, in the same Land District as they may select.

"And as in duty bound your Memorialists will ever pray."

It will be noted that this Memorial refers only to land disposed of to settlers and under the town site act, and asks that the county commissioners be authorized to select lands in lieu of such land. Thereupon Congress passed a joint resolution approved

March 3, 1857 (11 Stat. 254), entitled, "A resolution relative to Sections 16 and 36 in the Territories of Minnesota, Kansas and Nebraska," by which it was enacted:

"That where any settlements, by the erection of a dwelling house or the cultivation of any portion of the land, shall have been or shall be made upon the sixteenth or thirty-sixth sections (which sections have been reserved by law for the purpose of being applied to the support of schools in the Territories of Minnesota, Kansas and Nebraska, and in the States and Territories hereafter to be erected out of the same) before the said sections shall have been or shall be surveyed; or when such sections have been or may be selected or occupied as town sites, under and by virtue of the act of Congress approved twenty-third of May, eighteen hundred and forty-four, or reserved for public uses before the survey, then other lands shall be selected by the proper authorities, in lieu thereof, agreeably to the provisions of the act of Congress approved twentieth May, eighteen hundred and twenty-six, entitled, 'An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for.' And if such settler can bring himself, or herself, within the provisions of the act of fourth of September, eighteen hundred and forty-one, or the occupants of the town site be enabled to show a compliance with the provisions of the law of twenty-third of May, eighteen hundred and forty-four, then the right of preference granted by the said acts, in the purchase of such portion of the sixteenth or thirty-sixth sections, so settled and occupied, shall be in them respectively, as if such sections had not been previously reserved for school purposes."

At the time of the admission of the state of Minnesota into the Union approximately one-fourth of the total area thereof was unceded Indian land subject to the original right of occupation by the Indians, and at the date of the act of Congress establishing a

territorial government for Minnesota, to-wit, March 3, 1849, the larger part of the state was unceded Indian land. Much of the territory was ceded in 1854 and 1855. We submit herewith a map showing the different sessions after the act creating a territorial government and down to the present time.

It is stipulated in this case (Stipulation 3rd Subdivision):

"That except as its status may have been affected or changed by the treaty of October 2, 1863, (13 Stat., 667), by the President's order of March 18, 1879, enlarging what was then known as the White Earth Indian Reservation, by the act of Congress of June 2, 1890 (26 Stat., 126), or by one or more of these, the district or country embracing the lands in controversy continued to be unceded Indian lands subject to the original right of occupany of the Chippewa Indians up to the time of the action had on March 4, 1890, under the said act of January 14, 1889."

We shall show hereafter that none of the acts in the stipulation referred to made this an Indian reservation. The country referred to remained unceded Indian territory. The country east and south was ceded by the Indians by treaty on February 22, 1855, by metes and bounds (10 Statutes, 1165), and on the west by treaty of October 2, 1863 (13 Statutes, 67). This left the territory in question in this suit unceded Indian lands occupied by small bands of Indians. It is admitted that no part of Sections 16 and 36 embraced within this territory has been allotted to any Indian or entered, sold or disposed of as agricultural land or pine land or otherwise (Answer page 13), and that no settlement has been made upon any part of

Sections 16 or 36 in said country, by the erection of a dwelling house or the cultivation of any portion thereof, and that no part of either of said sections has been selected or occupied as a town site. Answer page 8.

But it is claimed that Sections 16 and 36 were "reserved for public uses," and the facts on which this claim is made are as follows:

On January 14, 1889, Congress passed an act (25 Statutes, 642) for the relief and civilization of the Chippewa Indians. In substance it provided as follows:

Section 1 authorized the president to appoint commissioners to obtain from the Indians a cession and relinquishment of these lands, except so much thereof as might be set aside to fill allotments to Indians in severalty; and provided for the taking of the census of the Indians.

Section 3 provided for setting aside a certain part of this territory for allotments in severalty.

Section 4 provided for a survey of the lands, for the appointment by the Secretary of the Interior of examiners to examine the pine lands, and for appraisal of the same.

Section 5 provided for advertisement and auction sale of the pine lands.

Section 6 for a sale of the agricultural lands to settlers under the homestead laws.

Section 7 provided that the funds, after deducting the expenses, should be deposited in the treasury of

the United States to the credit of the Chippewa Indians, and provided for the distribution thereof.

No mention is made in this act of Sections 16 and 36, but there is nothing in the act to indicate that Congress intended to sell Sections 16 and 36.

The census was taken showing the total number of Indians on all of the Indian lands in the state to be 8,304, male, female, adults and minors. Rep. Chippewa Ind. Com. Executive Document, No. 247, pg. 9, 51, 51st S. The total number of Indians on the unceded land in question in this case is 1,168. Report of Chippewa Indian Commission, page 3.

On March 4, 1890, President Harrison approved the treaty ceding these lands to the government under the act of 1889. Report Chip. Ind. Com. pg. 27 to 32.

In said treaty among other things it was provided for the setting aside of a part of said territory for separate allotments. This territory is described in the last article of the treaty, page 28, and is known as the "Diminished Reservation," shown on the map as the Red Lake Indian Reservation. The treaty is attached hereto as Appendix A.

Immediately after the passage of the act of Congress of January 14, 1889, the state of Minnesota notified the Secretary of the Interior and the Commissioner of the General Land Office that it claimed title to each of Sections 16 and 36 in the lands ceded under the said treaty, and has ever since continued to assert such claim.

Admission in answer, page 12.

Senator Cushman K. Davis on March 2, 1891, addressed a letter to the Hon. Thomas H. Carter, then Commissioner of General Land Office, setting forth the claim of the State to these lands, and another letter on Sept. 3, Stipulation pages 2 to 4. The Commissioner of the General Land Office answering the communication of Senator Davis decided that the State was entitled to the lands. Stipulation pages 5 to 8.

Subsequently Congress passed an act entitled "An act to amend an act entitled 'An act for the relief and civilization of the Chippewa Indians in the state of Minnesota," approved February 26, 1896 (29 Stat. 17), in which, among other things, it was enacted:

"That Sections numbered 16 and 36 in each township so surveyed shall not be sold until the claim of the state of Minnesota to the ownership of said sections as part of the school lands of said state shall have been determined."

But the defendants claim that the present Secretary of the Interior has determined the ownership of said Sections 16 and 36 by his decision of May 9, 1899, 28 Land Decisions, 374. Answer pg. 11.

At the time of the filing of the bill a large portion of the lands had been surveyed; all have since been surveyed, and it is stipulated that this suit may be heard and determined in like manner and with like effect as though the lands had all been surveyed at the time of the filing of the bill. Stipulation, paragraph 2.

The total amount of lands in the territory thus ceded by the Indians is about 3,546,356 acres, in which Sections 16 and 36 would amount to 197,120 acres, but there was set apart for separate allotment what is known as the "Diminished Reservation," described on page 9 of the answer, and containing 663,954.22 acres, in which there are approximately 36,000 acres in Sections 16 and 36, so that this dispute involves:

First, about 160,000 acres, being Sections 16 and 36 in the lands ceded to the government by the treaty, Appendix A hereto attached, outside of the lands set aside for separate allotment.

And second, Sections 16 and 36, in the territory, which was set aside for separate allotment to the Indians.

It is stipulated by the 6th Sub-division of the Stipulation, as follows:

"Sixth. That upon the hearing of this cause either party shall be at liberty to refer to and read from any Indian treaty, any act or resolution of Congress or of the Territory or State of Minnesota, whether private or public, any publication made under the authority of Congress or either house thereof, or of any executive department or bureau therein, including the pamphlet known as 'Executive Orders relating to Indian Reserves,' so far as the same may be relevant or material to this suit, or a proper matter for the court to consider in any aspect of this cause; and any such matter may be so referred to or read from with like effect as if it were herein fully set forth."

From the foregoing state of facts we deduce the following proposition:

I.

THE TERRITORY IN QUESTION WAS NOT AN INDIAN RESERVATION, BUT WAS WHAT IS KNOWN AS UNCEDED INDIAN COUNTRY SUBJECT TO THE ORIGINAL RIGHT OF OCCUPANCY BY THE CHIPPEWA INDIANS.

II.

WHETHER THE COUNTRY WAS AN INDIAN RESERVATION OR UNCEDED INDIAN COUNTRY, IT WAS SUBJECT TO THE GRANT TO THE STATE WHEN THE INDIAN RIGHT OF OCCUPANCY WAS EXTINGUISHED.

ARGUMENT.

I.

THE TERRITORY IN QUESTION WAS NOT AN INDIAN RESERVATION, BUT WAS WHAT IS KNOWN AS UNCEDED INDIAN COUNTRY SUBJECT TO THE ORIGINAL RIGHT OF OCCUPANCY BY THE CHIPPEWA INDIANS.

It is stipulated between the parties, third subdivision of the stipulation, as follows:

"That except as its status may have been affected or changed by the treaty of October 2, 1863 (13 Stat. 667), by the President's order of March 18, 1879, enlarging what was then known as the White Earth Indian Reservation, by the act of Congress of January 14, 1889 (25 Stat. 642), or by the act of Congress of June 2, 1890 (26 Stat. 126), or by one or more of these, the district or country embracing the lands in controversy continued to be unceded Indian lands subject

to the original right of occupancy of the Chippewa Indians up to the time of the action had on March 4, 1890, under the said act of January 14, 1889."

All of the state of Minnesota, and in fact, all of the Northwest country was at one time Indian country or unceded Indian lands inhabited by various bands of Indian tribes. In 1834 Congress passed an act, 4 Statutes, 729, for the purposes of which Indian country was defined therein as follows:

"All that part of the United States west of the Mississippi River and not within the states of Missouri and Louisiana or the territory of Arkansas; and also that part of the United States east of the Mississippi River and not within any state to which the Indian title has not been extinguished, for the purposes of this act be taken and deemed to be Indian country."

It does not need a statute to define Indian country. The court will take judicial knowledge of the fact that except as the same has been specially reserved by treaty stipulations, or by statutes, or executive orders by authority of statutes, the entire northwesterly country, including Minnesota, was unceded Indian country subject to the original right of occupancy of the Indians, the fee of which was in the government.

It is stipulated in this case that such was the condition of the land in question up to the date of the ratification of the treaty with the Chippewa Indians on March 4, 1890, unless its status was changed by the treaty, executive order, or statutes referred to in the stipulation. That none of these changed the status of this country is evident from even a casual inspection of them.

Referring to the treaty of October 2, 1863 (13 Stat. 667) it will be found that by this treaty the Chippewa Indians ceded to the government their rights of occupancy to the most northwesterly portion of the state of Minnesota lying west and southwest of the land in question, and designated on the map herewith furnished, for which the government agreed to pay certain sums.

By the 9th article 640 acres on the north side of Pembina River was set aside for the chiefs "Moose Dung" and "Red Bear." This is the only reservation referred to in the treaty. It simply ceded a portion of the previously unceded country, leaving intact that portion of the country ceded by the treaty of March 4, 1890.

It is next claimed that the President's order of March 18, 1879, enlarging what was then known as the White Earth Indian Reservation, changed the status of this country from unceded Indian country to an Indian reservation. This executive order added certain lands to the White Earth Reservation. The White Earth Reservation is situated to the south of this unceded country, and is no part of it. In the description of the lands added to the White Earth Reservation the northern boundary is described as the southern boundary of the Red Lake Indian Reservation. The executive order will be found hereto attached as Appendix B. It simply extended the northern boundary of the White Earth Reservation to the southern boundary of this unceded country, and

called it in this order the "Red Lake Indian Reservation."

The executive order had no reference to the country is question, and only by way of description was it mentioned. This order was afterwards revoked by the President, and the White Earth Indian Reservation reduced to the extent in which it existed at the time of the session of March 4, 1890.

The only other act we desire to call to the court's attention is the act of June 2, 1890 (26 Stat. 126), which granted the Duluth & Winnipeg Railroad a right to extend its railroad through the Winnipigoshis, Cass Lake, White Oak Point and Red Lake Indian Reservations in the state of Minnesota. This language is simply used to designate the country. Neither one of the acts or orders to which we have referred in the slightest degree changed the status or condition of this country or the rights of the Indians therein.

Forty-three Cases Brandy, 11 Fed. Rep. pg. 47;

Same case, 14 Fed. pg. 539;

United States v. Leathers, 6 Saw. 17;

United States v. Payne, 8 Fed. 383.

Judge McCrary in the first case, reported in 14 Federal, said:

"An Indian reservation is a part of the public domain set apart by proper authority for the use and occupation of a tribe or tribes of Indians. It may be set apart by an act of Congress, by treaty, or by executive order; I do not think an Indian reservation can be established by custom or prescription. The fact that a particular tribe or band of Indians have

for a long time occupied a particular tract of country does not constitute such tracts an Indian reservation. Originally, all of the public domain was occupied by the Indians, and the reservation policy was adopted with a view of locating them in certain districts, and opening the remainder of the public land for white settlement. It cannot, therefore, be said that a particular part of the public domain, upon which an Indian tribe has been suffered long to remain, while other portions have been open to settlement, or set apart specifically for Indian occupancy, constitutes such tract an Indian reservation. It simply retains the character it had at the beginning, and can only be correctly designated as a tract of public land to which the Indian title has not been extinguished. * * * The fact that the tract of country in question has been sometimes referred to in treaties and official reports as the 'Red Lake Indian Reservation,' is not sufficient to authorize the court in a quasi criminal case, to declare it such."

It seems clear that the status of this country was never changed from this original condition. The boundaries were arrived at by fixing the boundaries of the territory from time to time ceded by different treaties. The country on the east was ceded by the treaty of 1855, (10 Stat. at Large, 1165); the country on the west by the treaty of October 2, 1863, (13 Stat. 667), simply leaving the territory in question unceded Indian country in the same condition as it had always been.

The other statute referred to in the stipulation is the statute of January 14, 1889, (25 Stat. 642) which provided for the cession of these lands to the government, and for a sale thereof to settlers and others, as heretofore recited. It will not be necessary to refer to the provisions of this statute under this head

of our brief. It will be fully considered under the next sub-division.

The fee to public lands occupied by Indian tribes, whether the status be that of an Indian Reservation created by law, or a treaty, or merely Indian country, is in the United States, and passes by grant subject to the Indian right of occupancy, and no patent is necessary.

This doctrine is firmly established.

Cherokee Nation v. Georgia, 5 Pet. 48.

Beecher v. Wetherby, 95 U. S. 517.

Heydenfeldt v. Daney Gold Co., 93 U. S. 634.

Buttz v N. P. R. R. Co., 119 U. S. 55.

Clark v. Smith, 13 Pet. 195. (22:211)

U. S. v. Cook, 19 Wall. 591.

St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528.

Gaines v. Nicholson, 9 How. 355.

The rights of the State were merely in abeyance or suspension during the period of Indian occupancy, and vested *eo instanti* upon the extinction of the Indian right of occupancy and identification by public survey. The only qualification to this is when there has been an appropriation of a section, prior to survey, for any public purpose contemplated by the compact between the United States and the State.

This is clearly stated in

Buttz v. N. P. R. R. Co., 119 U. S. 55.

"The land in controversy and other lands in Dakota, through which the Northern Pacific Railway was to be constructed, was within what is known as Indian country. At the time the act of July 2, 1864, was

passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the Company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the Government. The grant conveyed the fee subject to this right of occupancy. The railroad company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals. As we said in Beecher v. Wetherby, 95 U. S. 517 (Bk. 27. L. ed. 440): "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and it is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of land occupied by them has always been recognized by this court from the foundation of the government.' In support of this doctrine several authorities were cited in that case."

And in Gaines v. Nicholson, where it is said:

"The state of Mississippi acquired a right to every sixteenth section, by virtue of these acts, on the extinguishment of the Indian right of occupancy, the title to which, in respect to the particular sections, became vested, if vested at all, as soon as the surveys were made and the sections designated. No patent was necessary, or is ever issued, for these school sections."

II.

WHETHER THE COUNTRY WAS AN INDIAN RESERVATION OR UNCEDED INDIAN COUNTRY, IT WAS SUBJECT TO THE GRANT TO THE STATE WHEN THE INDIAN RIGHT OF OCCUPANCY WAS EXTINGUISHED.

But whether we are correct in our first proposition or not, whether the country was an Indian reservation or unceded Indian Country; when the Indian's right of occupancy was extinguished, under the authority of the act of 1889, and the land surveyed and offered for sale, the right of the state to Sections 16 and 36 immediately attached.

It is not claimed that any part of this country outside of the Diminished Reservation has been allotted in severalty or is to be so allotted, or that any settlements by the erection of dwelling house or the cultivation of any portion thereof has been made or selected, or occupied as town sites, but it is claimed that the entire country was by the act of 1889 "reserved for public uses," and therefore the right of the state does not attach. This is the pivotal question in this case.

THEREFORE THE QUESTION IS, WHEN THESE LANDS WERE SURVEYED WERE THEY BY THE ACT OF 1889 "RESERVED FOR PUBLIC USES" WITHIN THE MEANING OF THE JOINT RESOLUTION OF CONGRESS?

It will not be claimed that the act of 1889 specifically reserved Sections 16 and 36 for public uses or

that it specifically provided that these sections should be sold and the state deprived of them, but because the act of 1889 does not mention sections 16 and 36, and provides for a sale of the lands of the Red Lake Indian Reservation and all other reservations, that by inference Congress intended to deprive the state of Sections 16 and 36 in this enormous territory. Was such the intention of Congress? Being a question of the construction of this statute it is our claim that the court should give a most liberal construction in favor of continuing the time-honored policy of devoting Sections 16 and 36 in each state and territory to maintaining the public schools, and in favor of fulfilling the pledges of Congress to the territory and state of Minnesota. If these laws are reasonably consistent with such a construction, it should be given them.

The appropriation of the public lands for the encouragement of education is a cherished policy of the national government, initiated before the adoption of the present constitution of the United States.

By an ordinance the Confederate Congress in 1785 inaugurated the practice of setting apart Section No. 16 of each township of public lands for the maintenance of schools.

Again by the ordinance of 1787 for the government of the northwest territory, article 3, it was provided that, "religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

This policy thus inaugurated was continued in the laws organizing each of the states in the northwest, commencing with Ohio, and has been incorporated in the constitution of those states to the present time. It is needless to say that this policy has been of great value in the growth and development of the West. Speaking of this policy, Mr. Justice Campbell in the case of Cooper v. Roberts, 18 How. 178 of the Opinion, said:

"But the constancy with which the United States have adhered to the policy in the various compacts with the people of the newly-formed States, and the care which congress has manifested to prevent the accumulation of prior obligations which might interrupt it, fully display their estimate of its value and importance. There is, obviously, a definite purpose declared to consecrate the same central section of every township of every State which might be added to the federal system, to the promotion 'of good government and the happiness of mankind,' by the spread of 'religion, morality, and knowledge,' and thus, by a uniformity of local association, to plant in the heart of every community the same sentiments of grateful reverence for the wisdom, forecast, and magnanimous statesmanship of those who framed the institutions for these new States, before the constitution for the old had yet been modeled."

Bearing in mind therefore that liberal construction that should be given to these laws to carry out the policy of education which has been of inestimable value and will be of great value to all generations to come, let us look at the statutes of Congress, the constitution of the state, and the resolution of Congress and see whether it was the intention that the state should receive Sections 16 and 36 in the unceded

Indian country and Indian reservations when the Indian right of occupancy should be extinguished. The act of Congress of March 3, 1849, creating a territorial government provided, "that when the lands in said territory shall be surveyed under the direction of the government of the United States preparatory to bringing the same into market the Sections 16 and 36 of each township in said territory *shall be, and the same are hereby reserved* for the purpose of being applied to schools in said territory, and in the state and territories hereafter to be erected out of the same."

Here was a pledge given to the people who were to inhabit what was at that time an unknown region scarcely upon the borders of civilization, peopled by roving bands of Indians. Clearly it was not the intention that the occupancy of this country by the Indians should prevent the state from receiving the school sections when the rights of the Indians should be extinguished by cession to the United States. Such a construction would have made this pledge of little value. It had been the experience in Ohio, Indiana, Michigan, Illinois and Wisconsin, that as rapidly as the country was settled the Indian title became extinguished, and this act of Congress was undoubtedly passed with the intention that as fast as the Indian rights were ceded and the lands surveyed, the state's rights should immediately attach. Such had been the holding of the courts as to Michigan and Wisconsin. Some of these cases were decided prior to the

time of the admission of Minnesota into the Union. In the light of these decisions and in the light of the experience of Congress, it must be presumed that it was intended that the gift of Sections 16 and 36 should apply to unceded Indian country and Indian reservations. When Congress passed the act enabling the people of a territory to form a state government, it renewed this pledge which was accepted by the state in its constitution of 1858. At that time approximately one-fourth of the state was still unceded Indian country, and there is nothing to indicate that Congress intended to except Indian reservations or unceded Indian country from the application of this grant. Had such been the intention appropriate words of exclusion would have been used. The language, however, would indicate the contrary intention. The proposition contained in the enabling act was "that Sections No. 16 and 36 in every township of public lands in said state, and, where either of said sections or any part thereof *has been sold or otherwise been disposed of*, other lands equivalent thereto and as contiguous as may be, shall be granted to said state for the use of schools."

Certainly, reserving land for reservations was not a sale or disposal of them within the meaning of this congressional act.

Referring now to the joint resolution of March 3, 1857, it is our opinion that this is not intended to enlarge the exceptions, but to specify them more particularly.

Referring to the memorial of the state legislature it will be noticed that the state calls the attention of Congress to the fact that when the government surveys were made it was found that settlers had investments of both money and labor in opening up farms upon parts of the school land, and that certain town sites had been platted under the congressional act of 1844, and prayed that lands be granted to the state in lieu of these lands occupied by settlers and town sites. Congress thereupon passed the resolution providing what settlement, improvement and cultivation should be sufficient to take the land out of the grant to the state, and also provided that when such sections had been selected or occupied for town sites under the congressional act of 1844 "*or reserved for public uses*" before the survey, then the authorities may select lands in lieu thereof agreeably to the provisions of the act of Congress of 1826.

It is a settled doctrine of this court that when a grant is made to a state for the use of its schools of certain sections of land out of the public domain, the grant as to such sections falling within Indian reservations or territory to which the Indian right of occupancy has not been extinguished, is in suspension only during the period of such occupancy.

Beecher v. Wetherby, 95 U. S. 517;

Cooper v. Roberts, 18 How. 173;

United States v. Thomas, 151 U. S. 577;

Buttz v. N. P. R'y, 119 U. S. 55;

Natoma Water & Mining Co. v. Bugby, 96 U. S. 165.

The case of Beecher v. Wetherby, 95 U. S. 517, is identical with the case at bar. In that case the act enabling the people of Wisconsin Territory to form a constitution and government, approved August 6, 1846, provided that "Section 16 in every township of the public lands in said state, and where such section *has been sold or otherwise disposed of* other lands equivalent thereto and as contiguous as may be shall be granted to said state for the use of schools." It will be seen that this is a literal copy of the enabling act of Minnesota. By a treaty of August 9, 1825, 7 Stat. 272, the Menomonee lands were declared "bounded on the north by the Chippewa country, on the east by Green Bay and Lake Michigan extending as far south as Milwaukee River, and on the west they claim to Black River."

The lands in question were within this district.

A further treaty concluded with the Menomonees February 8, 1831 (7 Stat. 342), confirming those boundaries, was ratified by the senate with a proviso that two townships on the east side of Winnebago Lake should be set aside for the use of the Stockbridge and Munsee Indians. This remained an Indian reservation until February 6, 1871, when Congress by a statute (16 Stat. 404), entitled "An act for the relief of the Stockbridge and Munsee tribes of Indians in the State of Wisconsin," provided for the sale of these two townships. The act is very like the act of 1889 providing for a sale of the unceded lands of the Chippewas. Section 1 provided that the two townships

should be examined and appraised by two or more disinterested appraisers to be selected by the Secretary of the Interior. Their appraisal should state the quality of the soil, the quantity and value of the timber growing on each lot, estimating the pine at not less than one dollar per thousand, the value of all improvements, etc.

It was then provided for advertising the lands and selling them, and after paying the cost of the appraisement and other expenses the portion of the proceeds belonging to the citizens was to be distributed, and that belonging to the Indian tribe to be deposited in the United States treasury, drawing five per cent, and to be used for the benefit of the Indians.

No mention is made in this act of Section 16, *and yet the court held that this act would be construed to apply only to those portions of the townships which were outside of Section* 16. *The court said:*

"The act of Congress of Feb. 6, 1871, authorizing a sale of the townships occupied by the Stockbridge and Munsee tribes, must, therefore, be held to apply only to those portions which were outside of section 16. It will not be supposed that Congress intended to authorize a sale of land which it had previously disposed of. The appropriation of the sections to the State, as already stated, set them apart from the mass of public property which could be subjected to sale by its direction."

It will be noted that long before this enabling act of Congress granting or pledging Section 16 to the state of Wisconsin, was enacted or accepted by the state, these two townships were set apart as an In-

dian reservation for the Stockbridge and Munsee tribes. At the time the surveys were made they were occupied by these Indians, and the act of 1871 providing for the sale, disposition and division of the proceeds, made no mention or reserve of Section 16 to the state of Wisconsin; and yet the court said that it will not be presumed that Congress intended to authorize a sale of land which had been previously disposed of. We say in this case that it will not be presumed that by the act of 1889 providing for the disposition of these lands Congress intended to sell and dispose of land which it had irrevocably pledged to the state. We shall hereafter refer to the meaning of the phrase, "lands reserved for public uses." Suffice it here to say that there are many public uses, such as military reservations, public buildings, light-houses, etc., to which small tracts of the land might be put, consistent with the meaning of this section. It can hardly be supposed that Congress intended by this act to deprive the state of an enormous tract of land or of all the land in the Indian country or Indian reservations. Referring to this subject of the Indian reservations, Mr. Justice Field in the last case cited, said:

"It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and consti-

tuting only a pledge of a grant *in futuro*, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted." * * *

"The plaintiff contends that there had been a prior reservation of the land to the use of the Menomonee tribe of Indians.

"It is true that, for many years before Wisconsin became a State, that tribe occupied various portions of her territory, and roamed over nearly the whole of it. In 1825, the United States undertook to settle by treaty the boundaries of lands claimed by different tribes of Indians, as between themselves, and agreed to recognize the boundaries thus established, the tribes acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power. The land thus recognized as belonging to the Menomonee tribe embraced the section in controversy in this case. Subsequently, in 1831, the same boundaries were again recognized. But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized

by this court from the foundation of the government. It was so ruled in Johnson v. McIntosh, 8 Wheat. 543, in 1823; and in United States v. Cook, 19 Wall. 591, in 1873. Other cases between those periods have affirmed the same doctrine. Clark v. Smith, 13 Pet. 195. See also Jackson v. Hudson, 3 Johns. (N. Y.) 375; Veeder et al. v. Guppy, 3 Wis. 502; and 8 Opin. Atty. Gen., pp. 262-264." * * *

"In the construction of grants supposed to embrace lands in the occupation of Indians, questions have arisen whether Congress intended to transfer the fee, or otherwise; but the power of the United States to make such transfer has in no instance been denied. In the present case, there can hardly be a doubt that Congress intended to vest in the state the fee to section 16 in every township, subject, it is true, as in all other cases of grants of public lands, to the existing occupancy of the Indians so long as that occupancy should continue. The greater part of the State was, at the date of the compact, occupied by different tribes, and the grant of sections in other portions would have been comparatively of little value. Congress undoubtedly expected that at no distant day the State would be settled by white people, and the semi-barbarous condition of the Indian tribes would give place to the higher civilization of our race; and it contemplated by its benefactions to carry out in that State, as in other States, 'its ancient and honored policy' of devoting the central section in every township for the education of the people."

We have quoted at length from this decision because the argument is so applicable to the case at bar. It is there said that these lands (section 16) were withdrawn from any other disposition and set apart from the public domain so that no subsequent sale of them *could be construed* to embrace them, although they were not specially excepted. Mark this language. Although the lands were not specially excepted from the act of 1889, the law would be con-

strued so as not to include them. It was contended in this case also that the lands were reserved by prior reservation for the Indian tribes. The court said that the greater part of the state was occupied by Indian tribes at the time of the admission of the state into the Union. This is equally true of Minnesota, and it is perfectly evident that Congress did not intend that the fact that the land was reserved for Indian tribes, should deprive the state of the lands when the Indian title should be changed or extinguished.

It will be noted that the court cites and approves the case of Cooper v. Roberts, 18 How. 173, one of the earliest cases arising under this school land dedication. The grant to the state of Michigan by Congress was substantially the same as that to the state of Wisconsin. It was as follows: "That the section number sixteen (16) in every township, and where such section has been sold, granted or disposed of, other lands equivalent thereto and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools."

The plaintiff procured a patent for these school lands from the state in 1851. It appears that in 1845 the Secretary of War executed a mining lease of these lands. This lease came to the Michigan Mining Company in 1847, and from thence until 1851 it held possession of the lands. In 1850 the company applied for a patent to the land office. In 1852 the entry of the company was allowed, but with a reser-

vation of whatever rights the state of Michigan might have. The land was surveyed in 1847. The question was whether the state of Michigan was entitled to the land or the Mining Company; whether the land had been *"previously sold, granted or disposed of"* so as to take it out of the claim of the state of Michigan. The court held that it had not. The mining lease was given in 1845. In 1847 Congress passed an act (9 Statutes 146), by section 2 of which it was provided as follows:

"Sec. 2. And be it further enacted, That the Secretary of the Treasury shall cause a geological examination and survey of the lands embraced in said district to be made and reported to the Commissioner of the General Land Office. And the President is hereby authorized to cause such of said lands as may contain copper, lead, or other valuable ores, to be exposed to sale, giving six months' notice of the times and places of sales in such newspapers of general circulation, in the several States, as he may deem expedient, with a brief description of the lands to be offered; showing the number and localities of the mines known, the probability of discovering others, the quality of the ores, the facilities of working the mines, and the means and expense of transporting their products to the principal markets in the United States. And all the lands embraced in said district, not reported as aforesaid, shall be sold in the same manner as other lands under the laws now in force for the sale of public lands, excepting and reserving from such sales section sixteen in each township for the use of schools, and such reservations as the President shall deem necessary for public uses."

It will be noticed that the President was authorized to sell all lands containing copper, lead or other valuable ores, and all the lands embraced within said district not reported to contain copper, lead or other

valuable ores, should be sold in the same manner as other lands under the laws then in force excepting and reserving from such sales Section 16 in each township for the use of schools, etc.

It was claimed that by this act mineral lands were ordered to be sold, and therefore came within the exception in the grant to the state of Michigan as to lands "sold, granted or disposed of." But the court declined to follow this construction, and said:

"It has been argued, that this exception is only applicable to the lands not contained in the geological report and that the mineral lands 'were appropriated and disposed of without reference to the school reservation of this section of the act.' But it does no violence to the language to embrace within the exception all the sales, for which the section provides, and we cannot suppose that congress could be tempted, with the hope of a small additional price, which is imposed upon the purchasers of the mineral lands, to raise a question upon its compact with Michigan, or to disturb its ancient and honored policy. We think the interpretation which claims this as an exception in favor of Michigan, is to be preferred to that which excludes her from the mineral lands under this compact. And this conclusion is strengthened by the fact that the power of the President to make useful public reservations is connected in the exception with the school reservations. There could be no reason for limiting the power of the President to a single class of the public lands, and to exclude him from another in the same district. We conclude that this act does not withdraw the mineral lands from the compact with Michigan."

This decision also contains a very interesting discussion of the history of these grants to states. Among other things the court said:

"But the constancy with which the United States have adhered to the policy in the various compacts

with the people of the newly-formed States, and the care which congress has manifested to prevent the accumulation of prior obligations which might interrupt it, fully display their estimate of its value and importance. There is, obviously, a definite purpose declared to consecrate the same central section of every township of every State which might be added to the federal system, to the promotion 'of good government and the happiness of mankind,' by the spread of 'religion, morality, and knowledge,' and thus, by a uniformity of local association, to plant in the heart of every community the same sentiments of grateful reverence for the wisdom, forecast, and magnanimous statesmanship of those who framed the institutions for these new States, before the constitution for the old had yet been modeled. Has the discovery of minerals of value upon this section been deemed a sufficient cause for its withdrawal from the operation of this policy, and the compa.. s which develop it?"

The case of Ham v. State of Missouri, 18 How. 126, is instructive upon the interpretation of the language "or otherwise disposed of" used in these various acts. A grant to the state of Missouri was made in 1820, of Section 16 in each township. The act provided: "and when these have been sold or otherwise disposed of other and equivalent lands are granted." By the act of Congress of March 3, 1811, 10th section, it was provided that until after a decision of Congress thereon no tract of land should be offered for sale, a claim to which had been in due time and according to law presented to the recorder of titles in the district of Louisiana and filed in the office for the purpose of being investigated by the commissioners appointed to ascertain the rights of persons claiming lands in the territory of Louisiana. It is claimed

that the section 16 in township 34 in question in this case did not vest in the state by reason of this proviso in the act of 1811. The land in question was claimed by Ham as grantee of the party who had occupied it, and presented to the recorder his claim as provided by this statute. The claim was rejected in 1811, and from this time until 1828 it remained in abeyance. In 1828 Congress confirmed the title in the grantors of Ham, but the court held that the state's grant of 1820 had intervened, and that the fact that these lands were reserved from sale by the proviso of the act of 1810, did not prevent the state's right attaching thereto.

The court said:

"In our construction of the act of congress of March 3, 1811, we have interpreted the proviso to the 10th section of that act as neither declaring nor importing a final and permanent divestiture, or any divestiture whatsoever, of the title of the United States, but as a provision prescribing a temporary arrangement merely for the purposes of investigation, leaving the title still in the government, to be retained or parted with according to the dictates of justice or policy, as these might be developed by such investigation. Nothing is here ordained which is definite in its character. Inquiry is all that is directed. The language and plain import of the 6th section of the act of the 3d of March, 1820, confer a clear and positive and unconditional donation of the sixteenth section in every township; and, when these have been sold or otherwise disposed of, other and equivalent lands are granted. Sale, necessarily signifying a legal sale by a competent authority, is a disposition, final and irrevocable, of the land. The phrase 'or otherwise disposed of' must signify some disposition of the property equally efficient, and equally incompatible with any right in the State, present or poten-

tial, as deducible from the act of 1820, and the ordinance of the same year. Upon any other hypothesis, the right to the sixteenth section would attach under the provision of the act of 1820; the State would still have the title, and could recover the section specifically, and there would be no necessity for providing for an equivalent for that section."

In the case of Buttz v. N. P. R'y. Congress granted to the N. P. R'y. Co. "ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and the plat thereof filed in the office of the commissioner of the general land office," etc.

The land in question was a part of a reservation of the Lake Travers and Devil's Lake reservations, and it was claimed that it did not vest in the railroad company, because at the time of the final location it was a part of this reservation. The court by Mr. Justice Field said:

"The provisions of the third section, limiting the grant to lands to which the United States had then full title, they not having been reserved, sold, granted, or otherwise appropriated, and being free from pre-emption or other claims or rights, did not exclude from the grant Indian lands, not thus reserved, sold or appropriated, which were subject simply to their right of occupancy. Nearly all the lands in the Territory of Dakota, and, indeed, a large, if not the greater, portion of the lands along the entire route to Puget Sound on which the road of the company was to be constructed, was subject to this right of occu-

pancy by the Indians. With knowledge of their title and its impediment to the use of the lands by the company, Congress made the grant, with a stipulation to extinguish the title. It would be a strange conclusion to hold that the failure of the United States to secure the extinguishment at the time when it should first become possible to identify the tracts granted, operated to recall the pledge and to defeat the grant. It would require very clear language to justify a conclusion so repugnant to the purposes of Congress expressed in other parts of the act. The only limitation upon the action of the United States with respect to the title of the Indians was that imposed by the act of Congress, that they would extinguish the title as rapidly as might be 'consistent with public policy and the welfare of said Indians.' Subject only to that condition, so far as the Indian title was concerned, the grant passed the fee to the company. In our judgment, the claims and rights mentioned in the third section are such as are asserted to the lands by other parties than Indians having only a right of occupancy."

True, there was a provision in this grant to extinguish the Indian title, but grants of lands to aid in the construction of railroads are construed most strongly against the grantee, and the court says that the provisions of the third section limiting the grant of lands to those not having been reserved, sold, granted or otherwise appropriated and free from claims of right, do not exclude the lands covered by the Indians' right of occupancy. That is a construction of the language of this grant applicable here. The general doctrine on this subject is again well stated by Mr. Justice Lamar, in the case of United States v. Thomas, 151 U. S. 577, in which the court says:

"The general rule established by the land department in reference to the school lands in the different States is that the title to them vests in the several States in which the land is situated, subject to any prior rights of occupation by the Indians or others which the government has stipulated to recognize."

Again quoting from the language of Mr. Justice Lamar, while Secretary of the Interior, the court said:

"'That where the fee is in the United States at the date of survey, and the land is so encumbered that full and complete title and right of possession cannot then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the right and title of possession unite in the government, and then satisfy its grant by taking the lands specifically granted.' And this view he considered 'as fully sustained by the decision of the courts and the opinions of the Attorneys General,' and cited in support of it Cooper v. Roberts, 18 How. 173; 3 Opins. 56; 8 Opins. 255; 9 Opins. 346; 16 Opins. 430; Ham v. Missouri, 18 How. 126."

DECISIONS OF THE INTERIOR DEPARTMENT.

Although the holdings of the administrative department of the Government are by no means conclusive on the courts, they are instructive as showing the practical application which has been made of the acts of Congress on the one hand and the decisions of the courts on the other. It may be safely asserted that the land department has always endeavored conscientiously to follow the ideas of the Court as expressed in Beecher v. Wetherby, supra, and other cases which we have cited. The question of construction which we are forced to consider in this case, is

one which has been touched upon in many cases before the Department. The acts of Congress granting lands to states and railroad companies for various purposes have been numerous, and inasmuch as the form and language of these granting acts have not been uniform, countless questions of construction have arisen. To follow the devious course of decision throughout the years of controversy over school grants, swamp land grants and railroad grants, could serve no very useful purpose here, and would only add confusion. There are, however, one or two generalizations from these decisions which we desire to make, and we shall take the liberty of referring briefly to a few of the decisions.

In Re State of Kansas, 2 Copp. 1107, it was held that lands embraced within an Indian reservation at the time of the passage of the granting act were subject to the act:

"I am forced to adopt the view that the Indian reservations were just as much a part of the State of Kansas, in contemplation of the acts referred to, granting school sections, as any other portion. It is true that the State could not take possession at once, or as it did of other lands, for the right of possession was in the Indians temporarily. The right of the State to claim the lands was made dependent upon certain conditions, or contingencies, which the acts referred to named. When these things were accomplished, the State's right attached. The Indian reservations were excepted out of the boundaries of the State only so long as the Indian title remained unextinguished, and no longer. This title extinguished, the lands became part of the State, and when part of the State, the State was entitled to the 16th and 36th sections therein. The latter fact just as necessarily resulted as the former."

It is law in the Department that if the fee to the lands is in the Government at the time of the survey, then the granting act applies and such lands are subject to the claim of the state even though at the time of the granting act the lands may have been part of a reservation. Furthermore, it is held that if at the date of the survey it is found that Sections 16 and 36 are embraced within an Indian reservation or are Indian country, the state may elect to make indemnity selections at once or may await the extinguishment of the Indian right and eventually take the original sections. This has been settled in numerous decisions of the Department purporting to follow the course mapped out in Beecher v. Wetherby, Hydenfeldt v. Daney, and other cases.

See In Re Colorado, 6 Land Decisions, 412;

In Re Barnard, 9 Land Decisions, 553;

In Re Michigan Swamp Land Grant, 8 Land Decisions, 308;

Callanan v. C., M. & St. P. R. R. Co., 10 Land Dec. 285;

In Re Sherry, 12 Land Dec. 176.

In In Re Colorado, 6 Land Decisions, 412, it was said:

"I think, however, the true theory of the school grant is this: That where the fee is in the United States at the date of the survey and the land is so encumbered that full and complete title and right of possession cannot then vest in the state, the state may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the

title and right of possession unite in the government, and then satisfy its grant by taking the lands specifically granted."

There is an interesting line of decisions holding that where land is at the time of the survey occupied under a homestead pre-emption, the state's title does not vest, but that if the pre-emptor fails thereafter to perfect his claim, or for any reason abandons it, the state's title will spring up and vest as of the date of the survey.

In Re Watson, 6 Land Dec. 71. The Secretary said:

"The act reserving lands to a territory for the benefit of schools not being a grant, but simply a reservation in contemplation of a future grant, Congress retains full control and power of disposition over such lands, until the contemplated grant shall take effect. Hence, it has provided that under certain circumstances the reservation for the benefit of schools shall be transferred from the specific section reserved to other lands as indemnity therefor.

"The territorial authorities are not bound to make selection of indemnity lands in lieu of lands within a sixteenth or thirty-sixth section, occupied by an actual settler prior to survey, but may await the subsequent action of the settler, and if he fails to prove up or abandons his claim, the right of the territory to have such lands held in reservation would attach immediately upon the extinguishment of the claim of such settler, and no right as against the territory can intervene by subsequent settlement, based upon the rights of a settler prior to survey, or the purchase of improvements thereof. This is the principle recognized in the case of Willingbeck (3 L. D., 383), and directly decided in the case of Johansen (5 L. D., 408)."

See also In Re Lowe, 1 L. D. 630;
Mette v. California, 1 Copp, 632;
Larson v. Pechierer, 1 L. D. 401, 403;
In Re Miner, 9 L. D. 408;
In Re Marceau, 9 L. D. 554;

In Re Talbot, 8 L. D. 495;
Gonzales v. Town Site of Flagstaff, 10 L. D. 348;
Revenaugh v. State of Washington, 13 L. D. 434.

It is held, moreover, that the right which the settler has at the date of survey is personal, and that a purchaser from him subsequent to the survey and prior to the publication of the settler's title, secures no rights as against the state.

Larson v. Pechierer, supra;
In Re Watson, 4 L. D. 169;
In Re Johansen, 5 L. D. 408;
Gonzales v. Town Site of Flagstaff, supra;
In Re Marceau, supra;
In Re Dermody, 10 L. D. 419;
Revenaugh v. State of Washington, supra.

These decisions are evidence of the uniform practice of the Department to regard the state as the owner of whatever interest in the land the general government had at the date of the survey. Strictly, under such circumstances, the state should be compelled to wait until this interest should vest in possession and became a valuable right. Of course, so long as the Indians or other parties were rightfully in possession, the state could not enter or derive any benefit from the land to which it, under this arrangement, actually took the fee. It was held that the state could not enter upon an Indian reservation to cut timber, and that in general a state, though en-

titled to the fee, could not in the slightest degree interrupt the Indian right of occupancy.

In re Sherry, 12 L. D. 176.

Turning now to the joint resolution of 1857, and assuming that such resolution is a part of the contract between the State and the government, it is clear that taking into consideration the memorial from the territorial legislature to Congress, which gave rise to the resolution what was sought was to indemnify the state against the loss of particular small tracts of land taken by settlers or for town site purposes.

Now, it is a well established rule that a proviso limiting a grant will be strictly construed.

United States v. Dickson, 15 Pet. 165.

The most that can be claimed by the Government is that the joint resolution of Congress of March 3rd, 1857, should be construed *in pari materia* with the act establishing the territorial government, the act authorizing the formation of the state government, and the constitution of the state accepting the proposition embraced in the latter act. For the purpose of this argument let us assume that it will be so construed. About the original intention of Congress there can be no dispute. It was undoubtedly its purpose to create out of the great public domain of the northwest a new territory, and eventually a new state, which should take its place side by side with the other territories and states which had been formed out of the same public domain, and be en-

dowed with the same rights and privileges in regard to the public schools.

For more than half a century certain well defined policies and methods of procedure had been followed in the creation of new states and territories. Among these policies the most favored was the one of reserving sections 16 and 36 of the public lands for educational purposes. We have seen that this policy antedated the constitution. Nowhere in the legislative history of this country can there be found any positive intention to depart from this policy, unless it be found in the act of 1889, construed in accordance with the contention of the Government in this case. It is safe to say, then, than Congress started out in 1849 to carry out the well settled and time-honored policy with respect to this new territory of Minnesota. The act of that year, forming the territorial government, absolutely reserved sections 16 and 36 for the benefit of the schools of the territory, and of any state and territory to be erected therefrom. In this act there was no reservation whatever in favor of bona fide settlers before the survey, or in favor of town-site purchasers in good faith, coming under the act of Congress authorizing the laying out of town-sites on unsurveyed government land. These persons settled or purchased at their peril.

Then came the act of 1857, authorizing the formation of the state government. This act contained definite propositions to the state, amounting to a substantial fulfillment of the pledges previously em-

braced in the act of 1849. But there was this proviso: That if any of the lands had been sold, or otherwise disposed of, other lands equivalent thereto and as contiguous as may be should be granted to the state in lieu of the lands so lost. In the meantime, the citizens of the territory had become convinced that the rigid enforcement of the act of 1849, and the carrying out of such a pledge, without qualification, would work hardship upon many individuals who had settled in good faith upon the public lands, with a view to securing ultimate preëmption rights, and also upon individuals who had made purchases under the town-site act. It was thought that justice might easily be done to both the individuals and to the territory by securing to these individuals the lands which they had taken up in good faith, and at the same time permitting the territory or state to select other lands in lieu of those which would thereby be given up. In any event, the lands so lost would be inconsiderable in quantity, and, as a great part of the state had already been surveyed, ample lands were available to fill up the state's quota out of lands reasonably contiguous. To that end the territorial legislature passed the memorial to Congress of February 26th, 1856. It will thus be seen that the memorial and the joint resolution, which took its rise therefrom, were the direct result of the desire to secure a specific remedy for a specific trouble. The territorial legislature simply requested relief from a certain embarrassing situation, which it set forth in detail

in its memorial. Can it be said that because the people of the territory saw fit to make this application in the interest of the actual settler and purchaser in good faith, there was any intention whatever to release the United States from the solemn pledge which it had made in the act of 1849, or that Congress had any intention of breaking faith with the State of Minnesota, or any other intention than granting the relief prayed for in the memorial? This joint resolution was passed five days after the act providing for the formation of the state government, in which Congress had made a definite proposition to the state to be accepted by the constitution to be formed thereunder. It was evidently the intention to specify clearly what acts of settlement, cultivation and improvement, and what sale under the town-site act, should relieve the lands from the operation of the school grant as proposed in the act of February 26th, 1857. Nothing had occurred to indicate that the people of Minnesota, or the Congress of the United States, had changed their minds in relation to this pledge. Contemporaneous history supplies us with no reason why the joint resolution of 1857 should be expected to go further than the memorial of 1856, upon which it was founded, and in reply to which it was passed. The proposition to the state provided that if sections 16 and 36 were sold, or otherwise disposed of, other lands should be granted in lieu of them. The memorial of the legislature and the joint resolution of 1857 were perfectly consistent with this

pledge, but to hold that a mere disjunctive phrase, couched in the most general terms, should be construed as authorizing Congress thereafter to dispose of a large domain, and thereby deprive the state of the school lands, is a construction, we dare say, which was not thought of at that time, either by Congress or by the people of Minnesota. We do not argue thereby that this phrase, "reserved for public uses before the survey" was altogether meaningless. It can receive a construction perfectly consistent with the proposition to the state contained in the act of Congress of 1857, to-wit: An authorization to Congress to reserve the right to hold out specific tracts of land for governmental purposes, as we shall hereafter show. But it is inconsistent with the history of the times, and with the previous pledges of Congress, to suppose that it was intended to justify the act of 1889, as that act is construed by the Land Department.

It could hardly have been the intention of Congress that an entire Indian reservation or tract of unceded Indian territory should be considered as coming within the terms of this act to defeat the right of the state to those sections. We contend that the public uses which were intended to operate as an appropriation prior to the surveys were uses to which the land itself might be put or employed for governmental uses. This land is not put to any public use; it is to be sold to settlers under the preëmption laws, or to pine land speculators and the proceeds invested for

the benefit of the Indians in exactly the same way as the reservation of the Stockbridge and Munsee Indians was ordered to be sold in Wisconsin, reviewed in the case of Beecher v. Wetherby. Under this sale no part of the land is reserved for public uses. It is sold for private uses. The use the money is to be put to may or may not be a public use. It is to be used for the benefit of the Indians. This form of reservation of land for public uses is very common, and we believe that it was intended to cover "public uses, as for arsenals, fortifications, light houses, custom houses, and other public purposes for which real property is required by the government," as was said in Gonzales v. French, 164 U. S. 338 and Shipley v. Cowen, 91 U. S. 330. Can it be said with any degree of force that the act of 1889 provides for the public purpose for which "real property is required by the government?"

Congress undoubtedly intended such a public use as was referred to in Spaulding vs. Martin, 11th Wis., 273, in which Mr. Justice Paine says: "But on the other hand, the Government of the United States has need of specific portions of land in various portions of the country, usually small tracts, for military or other purposes, for the actual transaction of the business of the Government. It is provided by law for the reservation of such tracts. They are known as 'Reservations.' There is significance in the word. Reserved from what? Obviously reserved from disposition in the manner and for the purpose for which

the general body of the public lands are disposed of. The particular necessity of the Government with respect to these reservations takes them out of the main body of the public lands and of the policy applicable thereto."

Not an acre of the land sold under that act will be used by the government for any known governmental purpose. We understand the words to mean the actual occupancy of the land to the exclusion of any other use to which it could be put by private owner. It appears incredible that in 1849 and 1857, when the greater part of the state was a wilderness and its population composed almost wholly of Indians, such a disposition as their sale for the creation of a fund for the Indians was in the mind of Congress. The language should be construed in the light of the circumstances existing when the compact was entered into. The extinguishment of the Indian title must have been contemplated, else express words would have been employed to negative them. The fact is that by no express language did Congress attempt to save to itself the right to dispose of the lands to other parties than the state. The grant having been expressly made of sections 16 and 36, the act of 1889 will not be deemed to contemplate any other disposition of them in the absence of express words evincing such a purpose, for, as was said in Beecher v. Wetherby, supra,—

"It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public

lands in the state, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted.
* * *

"It will not be supposed that Congress intended to authorize a sale of land which it had previously disposed of."

But even to hold that the language "reserved for public uses," employed by Congress in 1857, should be deemed to include the sale of a large tract of land for the purpose of devoting the proceeds to the support of an Indian tribe, by no means concludes the state in this case. It is our contention that though this language may possibly have been operative in 1857, it certainly has not been operative since the adoption of the constitution of the state. To be sure, the joint resolution was passed prior to the adoption of the constitution of Minnesota, but the latter instrument makes no mention whatever of the resolution, and simply accepts, in terms, the provisions of the act of Congress passed Feb'y 26th, 1857, entitled "an act authorizing the people of the territory of Minnesota to form a constitution and state government, pre-

paratory to their admission into the Union on an equal footing with the original states." It was evidently in the mind of the people of Minnesota, in adopting this constitution, to accept the provisions of an act which only provided that lands sold or otherwise disposed of should be taken out of the school grant. The approval by Congress of this constitution has the effect of an act of Congress passed subsequently to the joint resolution. The situation, therefore, presents this state of facts: First, a memorial seeking specific relief; second, a joint resolution in reply to the memorial, but employing language so general as possibly to give some room for the argument that it went further than the relief prayed for; third, the constitution, and the subsequent act approving the constitution, making no mention whatever of the joint resolution, but, on the contrary, harking back to the original proposition made prior to the joint resolution. Now, assuming, for the sake of argument, that the resolution really proceeded further than the memorial, then we say that the subsequent action of the state, and of the Government as well, utterly ignoring this circumstance (if it existed at all) amounts to a nullification of the joint resolution in so far as it can be said to have attached conditions and qualifications not embraced within the original proposition and for which the people had never made any request.

In this connection the case of the State of Minnesota vs. Bachelder, 1st Wallace, 109, is instructive. There the Attorney General of the State made the

point that the joint resolution of 1857 was void, and that, therefore, the state might hold the lands as against preëmptors in good faith and purchasers under the town-site act. His main contention was that the original act granting the lands for school purposes amounted to a dedication, perpetual and irrevocable. The Court, however, held that it was not necessary to go into the question of the power of Congress to pass the resolution, since the state should be deemed to be bound by its own action in the premises. It had requested in its memorial this particular legislation with respect to preëmptors; it was, therefore, fair to presume that this modification, being grafted upon the original proposition, at the state's own request, became a part thereof, so that the subsequent entry into the Union was an acceptance by the state of the propositions so modified. It will be seen, then, that according to the case in 1st Wallace, the state is bound by modifications engrafted upon the original propositions at its own request. It is clearly an unwarranted enlargement upon the doctrine of that case to say that the state should be bound by modifications otherwise inserted. Especially is this true when the state and the United States subsequently entered into a formal contract, evidenced by the constitution and the act of admission, without making any reference whatever to the joint resolution. It is one thing to say that the requested modifications were by the parties understood to be a part of that contract, but it is quite another thing to assert that any other feature

can possibly enter into it, without particular reference being made thereto.

But assuming we are wrong about this construction, there is nothing in the act of 1889 that would indicate that Congress intended to sell sections 16 and 36.

No deed was necessary to vest the title of school lands in the state.

Gaines v. Nicholson, 9 How. 355.

Sections 16 and 36 are not mentioned in the act of 1889.

Not having been mentioned in the act of 1889, and those sections having been previously granted to the State for the use of Public Schools, the Act of 1889 will be construed not to embrace these sections.

Wilcox vs. Jackson, 13th Peters, 498.

Spaulding vs. Martin, 11th Wis., 262.

Lake Superior &c. Co. vs. Cunningham, 155 U. S., 373.

Ex Parte Prow Dog, 109 U. S., 556.

In the case of Wilcox vs. Jackson, supra, the Act of Congress of June 26, 1834, authorized and directed the sale of all of the lands in the north-east district of Illinois. Previous to that time there was a military reservation on these lands. The court held that by implication the military reservation would be excluded from the act. The court said:

"But we go further, and say that, whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of pub-

lic lands, and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it."

In the case of Spaulding vs. Martin, supra, a tract of land lying on the south side of the Fox River in the County of Columbia and State of Wisconsin, known as Fort Winnebago, had been surveyed prior to 1835 by authorities of the United States, and the President had set aside this tract of land for military purposes. In 1846 Congress granted an amount of land equal to one-half of three sections on each side of the Fox River, through which the Fox River passes, for its improvement, the same to take effect when the state of Wisconsin should be admitted into the Union. The Court held that the latter act would be construed not to include the reservation for military purposes. The Court said:

"But on the other hand the government of the United States has need of specific portions of land in various parts of the country, usually small tracts, for military or other purposes, necessary for the actual transaction of the business of the government. It has provided by law for the reservation of such tracts. They are known as 'reservations,' and there is a significance in the word. Reserved from what? Obviously reserved from disposition in the manner and for the purposes for which the general body of the public lands are disposed of. The very necessities of the government with respect to these reservations take them out of the main body of public lands, and of the policy applicable thereto.

"When the government therefore, obviously in pursuance of its general policy in respect to its public lands held for sale, makes a grant to the state of large quantities, reaching through an extensive tract of country, where it has large bodies of those lands,

it is impossible to believe they intended to grant those tracts which had been set apart for public use. On the contrary, such a grant can be reasonably construed as referring only to those lands within the policy which induced it. And it must be assumed that these reservations were not specifically excepted in the grant, for the reason that they were so obviously outside of its scope and intent, that such exception was not supposed to be necessary. And this view is sustained by the only authorities that have ever passed upon the question. In Wilcox vs. Jackson, 13 Peters, 498, the Supreme Court of the United States used the following language: 'We go further and say that whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation, or sale would be construed to embrace it, or to operate upon it, although no reservation were made of it.'"

In the Lake Superior Company vs. Cunningham, supra, Mr. Justice Brewer said: "General terms in a subsequent grant are always held to not include lands embraced within the terms of a prior grant."

The act of 1889 and the enabling act of 1857 are in pari materi. They relate to the same general subject—the disposition of the public lands. The later act must be so read as to harmonize with and effectuate the policy of the earlier one.

"The legislatures are presumed to know existing statutes, and the state of the law, relating to the subjects with which they deal. Hence, they would expressly abrogate any prior statutes which are intended to be repealed by new legislation. Where there is no express repeal none is deemed to be intended, unless there is such an inconsistency as precluded this assumption; then it yields only to the extent of the conflict."

Sutherland, Stat. Con., Sec. 287.

"When enactments separately made are read in pari materia they are treated as having formed in the minds of the enacting body parts of a connected whole, though considered by such body at different dates, and under distinct and varied aspects of the common subject. Such statutes are taken together and construed as one system; and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions."

Sutherland, Stat. Con. Sec. 288.

In view of the policy of the government, and the many declarations of Congress and of the courts, to dedicate Sections 16 and 36 for the benefit of the schools in all the states and territories—in view of the liberal construction given these provisions by the land office and by the courts, is it reasonable to suppose that Congress intended to appropriate 197,000 acres of land in this great territory, worth many millions of dollars, for the benefit of 1,168 Indians? These lands are immensely valuable. In the report of the Chippewa Commission it is stated that the timber upon the pine lands of this ceded country is worth from $25,000,000 to $50,000,000. Anyone knows that the agricultural lands are worth from five to ten dollars an acre. Is it necessary by any forced construction, to increase this princely sum to be invested for the benefit of the Indians, and thereby deprive the state of so much from its school funds? Many of these Indians are citizens and entitled to participate in the benefits of the school fund.

The act of 1889 and the treaty made in pursuance thereof, was certainly passed and entered into with the full knowledge of the guaranty of the government and of its policy for a hundred years, and must be construed in the light of this policy. Congress has been ever zealous to guard this school fund. In 1891 an act entitled "An act making appropriations for the current and contingent expenses of the Indian department and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1892, and for other purposes," was passed. $90,000 was appropriated for the first payment under this treaty, whereby the unceded lands in Red Lake County were ceded to the United States. 26 Stat. at Large, 1003. By the last section of this appropriation bill (26 Stat. 1044) it was provided:

"No provision for settlement on or sale of the lands in the various agreements hereinbefore mentioned, shall apply to sections 16 and 36 thereon, which lands in the states are hereby granted to the state in which they are situated for the support of common schools of such state under the limitations prescribed by law, and such sections in the territories of the United States are reserved from occupancy, entry or sale under any land law of the United States; but this provision shall not apply to mineral land, which may be disposed of under the laws applicable thereto."

Here was a declaration of the Congress that under the Chippewa Indian treaty mentioned in this act, it was the intention that no settlement or sale of lands should interfere with the rights of the state therein. Again, in 1891, Congress passed an act, 26th Statutes, 796, providing in substance that the states and terri-

tories might *waive* their right to lands within the Indian Reservations and accept in lieu thereof indemnity lands. The act, however, contained a proviso as follows: "Provided, however, that nothing herein contained shall prevent any state or territory from awaiting the extinguishment of such military, Indian or other reservations and the restoration of the lands therein embraced to the public domain and then taking these sections 16 and 36 in place therein; but nothing in this proviso shall be construed as conferring any right not now existing." This act clearly indicates that Congress recognized its previous obligations, and recognized the fact that the states have the right to the lands in these several reservations or unceded Indian country, and provided that the states might waive these rights, but nothing therein should compel them to do so. If the state had no right, no waiver would be necessary. The entire Congressional history of these acts shows the fidelity with which the representatives of the people in Congress have adhered to the pledges made to the State of Minnesota, and to the other states, devoting these sections, 16 and 36, in each township to the benefit of the public schools.

But the question being in dispute before the Secretary of the Interior as to the right of the state to these lands, Congress approved an act February 26, 1896, 29 Stat. page 17, in which it was, among other things, provided:

"Sections numbers 16 and 36 in each township so surveyed shall not be sold until the claim of the state

of Minnesota to the ownership of said sections as a part of the school lands of said state shall have been determined."

The Secretary of the Interior claims that he has determined it by his opinion filed on May 9, 1899, 28 L. D. 374.

True, Secretary Hitchcock in the foregoing case decided that the State of Minnesota was not entitled to the lands, and Senator Thomas H. Carter, when Commissioner of the General Land Office, Sept. 9th, 1891, decided that the State of Minnesota was entitled to them. The opinion of the latter is contained in the Stipulation of Facts, page 5, et seq. It is not a new thing to have even the heads of the departments disagree and overrule each others' decisions, but we submit the two opinions representing opposite views in this case for the consideration of the Court.

If Minnesota is denied the right to these lands it will be the first western state which has failed to receive sections 16 and 36 in the Indian reservations or unceded Indian country sold for the benefit of the Indians under acts similar to that of 1889. We have seen that in Wisconsin the land of the Menomonees was sold under a similar act and that this court held that sections 16 and 36 must be construed as not included in the sale. In Kansas, under similar acts, the lands of the Osage Indians and other tribes were sold and the state received sections 16 and 36. It may be noted here also that the joint resolution of Congress of 1857, which the Secretary of the Interior relies on to differentiate the lands in the Red Lake

country from those in other reservations in other states, also applied to Kansas and Nebraska.

Such has been the uniform practice of Congress, of the Courts and of the Department, and if in this case there is any question of doubt as to whether the state is entitled to the lands or not, or as to what Congress meant in the various acts and resolutions affecting these lands, that doubt should be resolved in favor of the uniform practice of Congress and the well understood policy of the people that sections 16 and 36 should be devoted to the public schools.

The case of Missouri, Kansas & Texas R'y. Co. v. Roberts is easily distinguishable from the case at bar. In that case, by act of Congress of July 26th, 1866, 14 Statutes, 289, there was absolutely granted to the M., K. & T. R'y. Co. a strip of land 200 feet in width through all the public property, including Indian Reservations. This the Court held Congress had an absolute right to do, as the fee of the Indian Reservations was in the government.

Section 6, Act 1866, 14 Stat. 290.

The language of the grant is that "there is hereby granted to the Pacific Railroad Company," etc. The road was located prior to June 6, 1870. Roberts claimed under a patent from the State made May 25, 1871, claiming that the right-of-way strip 200 feet wide was a part of a school land section granted by Congress prior to the railway grant of July 26, 1866. The facts in relation to that are as follows:

The Osage Indian Reservation was specifically reserved as an Indian Reservation by act of Congress

of June 2, 1825. The boundaries were fixed and the land specifically reserved and the Indians given the right to occupy and cultivate these lands without reservation or molestation.

Indian Treaty, 7 Stat. 240, Article 2.

When the grant to the Railroad Company was made the Indians still occupied these lands and they were never ceded to the government until 1867.

When the constitution of Kansas was submitted to Congress, it contained the following provision:

"Provided always, that the following conditions be agreed to by Congress," among which conditions was the followirg: "That 'sections numbered sixteen (16) and thirty-six (36) in each township in the State, including Indian reservations and trust lands, shall be granted to the State for the exclusive use of common schools; and when either of said sections or any part thereof has been disposed of, other lands of equal value, as nearly contiguous thereto as possible, shall be substituted therefor.' "

Here was an attempt to have granted to the State Sections 16 and 36 in the Indian Reservations, whether those reservations or any part of them were sold or disposed of or appropriated by Congress for other purposes or not. This was rejected in specific language by Congress. 12 Statutes, 126, 127. Said statute contained the following:

"Provided, That nothing contained in the said constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treat between the United States and such Indians, * * * or to affect the authority of the Govern-

ment of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never been passed."

It was clear therefore, that whether or not the State would be entitled to Sections 16 and 36 when the Indian title was extinguished, it was not entitled to any part of the reservation until that title was extinguished, and the M. K. & T. Railroad having received a grant of 200 feet right-of-way through that Indian reservation and its rights having attached prior to the State's rights, the Railroad Company had the best and prior title to the 200 foot strip. The court said:

"This rejection by Congress of the original claim of Kansas to the school lands in townships sixteen (16) and thirty-six (36), and its subsequent abandonment by the State itself, and the concession to Congress of the right of absolute control of the lands until such right should be extinguished by appropriate legislation, distinguishes the case materially from that of Wisconsin, which was considered in Beecher v. Wetherby, 95 U. S. 517, and upon which the defendant in error principally relies. No such right was relinquished until after the grant of the right of way under the act of Congress of July 26, 1866, to the Missouri, Kansas and Texas Railway, and the title of the lands composing that right of way had become vested in that company."

It might be well here to mention that when the rights of the Indians were extinguished under the treaty which was proclaimed January 21, 1867, the State received Sections 16 and 36, in each township, and Congress declared by joint resolution that the

"16th and 36th sections in each township of said lands shall be reserved for state school purposes in accordance with the provisions of the act of the admission of this state of Kansas," thereby showing that it was the understanding of Congress that the act admitting Kansas into the Union gave it Sections 16 and 36 whenever the Indian title was extinguished.

Again, in this case there was a specific reservation of a comparatively small tract of land for the use of the Indians. The act provided that "there shall be reserved to and for the great and little Osage Indians or nations aforesaid, so long as they may choose to occupy the same, the following described tract of land:"

The case of Leavenworth, Lawrence & Galveston R. R. Co. v. United States, 92 U. S. 733, involved the same Indian reservation. In this case Congress in 1863, 12 Statutes, 772, made a grant of lands to the State of Kansas to aid in the construction of certain railroads, among others, the Leavenworth Co. This company was granted:

"Every alternate section of land, designated by odd numbers, for ten sections in width on each side of said road and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purpose aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have

sold. reserved, or otherwise appropriated, or to which the right of preëmption or homestead settlements have attached as aforesaid."

The land claimed in this case was the Osage Reservation. By a treaty with the Great and Little Osage Tribes of Indians on June 2, 1825, 7 Statutes, 240, the land was reserved for an Indian reservation. The treaty contained the following provision:

"Article II. Within the limits of the country above ceded and relinquished, there shall be reserved to and for the Great and Little Osage tribe or nation aforesaid, so long as they may choose to occupy the same, the following described tract of land."

The question was whether the land grant attached to the land in the Indian reservation. It will appear that the Indian reservation was in existence and in the occupation of the Indians at the time the land grant was made by Congress. A majority of the court held that the land grant did not attach, but this holding was placed upon two grounds: First, that a land grant only attaches to so much of the public domain as was subject to sale or other disposal at the time the land grant was made, and that it appearing in this case that at that time the land was set aside and forever reserved for an Indian reservation, the land grant did not attach, although in 1865 the lands were ceded to the United States by a treaty with the Osage Indians. 14 Statutes, 687.

The court held that for all practical purposes the Indians owned the land, as the actual right of possession, the only thing deemed of value, was forever guaranteed to them by the treaty until they should

elect to surrender it to the United States. This was a greater right than merely the right of possession of unceded Indian lands. This was a treaty setting aside a specifically defined territory as an Indian reservation.

Second, The court held that in all grants of land to aid in the construction of railroads the grant is most strongly construed against the grantee.

Neither one of these grounds applies to the case at bar. Grants of school lands are not strongly construed against the State, but are liberally construed in the interest of the public school system. And, furthermore, it cannot be claimed that unceded lands occupied by the Indians, were not intended to be included in the grant to the State of Minnesota. It is worthy of note that in this case there was a dissenting opinion by Mr. Justice Field, Mr. Justice Swain and Mr. Justice Strong, and it was only by reason of this strict construction against the railroad company that these lands were excluded from the grant.

In conclusion we have but to sum up in a general way, without further reference to the authorities, the line of argument presented in the foregoing pages.

We have said that the question here is one of construction. As in every such case, there exist two points of view from which the subject may be considered—the one technical and of a more purely legal nature; the other broad and comprehensive. Frequently these two points of view diverge and eventually lead to opposite conclusions, but in this case they tend in the same direction and support each other. Treating this case in its technical aspect we have dis-

cerned really two problems of construction. The first of these is centered about the joint resolution of Congress passed in the year 1857. The exigencies which that resolution was designed to meet, and the peculiar circumstances surrounding its passage, have been fully discussed. Had it not been for the interpolation of the phrase "otherwise reserved for public uses," the case of the State of Minnesota vs. Ethan Allen Hitchcock would doubtless never have appeared upon the docket of this court. In dealing with that phrase we have contended that a public use, within the meaning of the resolution, is a Governmental use. It is to be remembered that we are here considering a contract, and not passing upon the question of sovereign power. Therefore, the sole issue is one as to the intention of Congress in using these particular words at this particular time. The sale of these lands in order to raise a fund for the benefit of the Chippewa Indians may be a public use or public purpose in one sense, but we are concerned here simply with the question whether this is *the sort of* public use which can reasonably be supposed to have been in the mind of Congress in the year 1857. Our examination into the situation existing at that time has convinced us that no wider significance is to be attached to the expression than that of a purely governmental use So construed, the contract between the United States and the State of Minnesota would have been perfectly clear, and Congress would have been precluded from afterwards appropriating

sections 16 and 36 for such a public use as is here contemplated

Assuming, however, that our contention with respect to the joint resolution is unjustifiable, then we come to the second question of construction, that is to say, whether Congress by the act of 1889 meant to order the sale of sections 16 and 36. The fact that the language employed in the latter act is general in its character, and that no reference whatever is, in terms, made to sections 16 and 36, renders applicable the rule laid down in Wilcox vs. Jackson. Under that rule it cannot be supposed that Congress intended, by the employment of general language, to derogate from its previous grant to the state for school purposes.

So much for the technical aspects of this case. The principles employed are so clear and indubitable, and the facts fall so clearly within those principles, that the conclusion seems inevitably to follow in favor of the state on both of the points above mentioned.

But this is no ordinary case. The larger equities which we shall now review carry with them the overwhelming conviction that Congress could not have intended to divert these lands from educational purposes and devote them to the use and benefit of the Indians. Even a casual consideration of the issues here involved discloses the fact that the conflict is not between the State and the United States, but between two great policies of the National Government. The state presents its bill in equity as the trustee

for the educational interests of the people. The Land Department opposes the bill, claiming to be trustee of these lands for the benefit of the Indians. It is insisted that Congress, by the act of 1889, took from one beneficiary and gave to the other. The solution of the problem here raised is to be found by an examination of the policy of the United States toward the Indians on the one hand, and toward the public school system, on the other.

Dealing first with the Indians, it has been shown that throughout the history of legislation with respect to them, one principle, at least, has been constant. The Indian has never been regarded as the owner of the soil in fee. His occupancy is temporary, and his title, if so it may be styled, is ever shifting. His history is the tale of continual withdrawals before the tide of advancing civilization. While the Government, for a long period, dealt with him by treaty, as if he were an independent nation, yet the stubborn fact has always been apparent that in reality he was a subject, with only those rights and liberties which the Government saw fit to accord to him. To-day the Indian is termed "the ward of the nation." He not only can be moved about from place to place as Congress wills, but he is so moved about. It has always been understood that his title of occupancy to the public domain is eventually to be extinguished. Until within the last decade it has always been expected that the Indian would live by himself on reservations which should be assigned from time to time. But recently the attitude of the Government in this

respect has changed. Under the Dawes Act it is declared to be the settled policy of the Government to *force* the Indian to become the owner of land in severalty and a citizen of the United States. The act of 1889, whatever view is taken of the question raised therein in this case, is designed to carry out the same idea. It provides for the allotment of the diminished reservation to the Indians in severalty. Over twenty-five hundred of the Chippewa Indians in Minnesota, out of about seven thousand, have already become citizens of the United States, and, as such, are entitled to participate in the benefits of the common schools and the funds devoted thereto. With this ultimate disposition of the Indian question in mind, it cannot be said that there is any longer any conflict between the interests of the Indian and the interests of the public schools with regard to sections 16 and 36. If the Indian is to become a citizen of the United States, and of the state, and to enjoy all of the privileges incident to such citizenship, then the devotion of the sections in controversy to educational purposes is for his welfare as well as for that of all other persons in the community. In any event, to construe the act of 1889 in the manner contended for by the Government, is to accuse Congress of an inconsistency. It can hardly be said that Congress would enact legislation with a view to the ultimate citizenship of the Indian, and, at or about the same time, legislate in such a way as to diminish the privileges of such citizenship. There would be no policy in diverting these lands

lying within the limits of sections 16 and 36 from an object of which all Indians were eventually destined to participate in the benefits.

In the second place, the constant and unvaried attitude of the United States toward its public school system is the most conclusive answer that can be made to the argument of the respondent. No grander conception ever swayed the founders of any government than that which induced the setting aside of certain liberal portions of the public domain for school purposes. No nation has ever placed its educational ideals so high. It is to the everlasting credit of this country that while many of its early policies, including that toward the Indian tribes, have been subject to vacillation, this policy has never changed. The original idea was to promote the diffusion of knowledge throughout the country in the most effective manner. To this end the central section in every township was to be granted for school purposes. The main object was, of course, to have a certain amount of land, or a fund derived therefrom, located in every corner of the nation, so that no section or community could ever say that it had not been provided by the National Government with the means of fostering common school education. This theory has never been departed from. The liberality of the Government, to be sure, in many instances has been increased, so that two sections instead of one in each township have been devoted to this use in the grants made during the last fifty years. A concession has also been made to the rights of individuals who have

settled upon the public lands before the survey and before the school sections could be actually designated. In such case the innocent individual has been allowed to hold his claim, and the state has been directed to select lieu lands, but it is always to be understood that the lieu lands are to be "as contiguous as may be" to the lands which were lost, thus carrying out the idea that the school lands are to be scattered throughout the public domain. We cannot get away from the simple fact that our Government has always held true to the principle that a fund, in the shape of a certain portion of the public domain, was to exist, as far as possible, in every township within its jurisdiction, for the diffusion of knowledge.

It is almost unnecessary for us to point out here that the contention of the Government in this case is absolutely and unqualifiedly at variance with the theory of these school grants adhered to from the earliest times down to the present day. If the act of 1889 is to be given the construction asked for by the respondent, the State of Minnesota, as trustee for the public schools, will be ousted from a large tract of territory, embracing between three and four million acres. Within that tract there will then be not one single acre of ground available as a means of raising revenue to support a public school system. In the light of history and established practice, that Congress should do this, even by positive and direct legislation, assuming it to have the power, is hardly conceivable. That this court should, by inference from general language not specifically applicable to

the case, charge Congress with such an intention, is difficult to comprehend.

Another suggestion is worthy of note. Both the act authorizing the formation of the state government and the joint resolution of 1857 made provision for the selection of lieu lands in the place of those preëmpted, sold for town-site purposes or reserved for public uses. But such lieu lands lands were to be "as contiguous as may be" to those lost and, by the terms of the joint resolution, the act of May 20, 1826, entitled, "An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for" was to be followed. This latter act provided that lieu lands were to be taken from the same land district with those which had been lost. Taking these facts into consideration, and also the further facts that the state is entitled to wait until the Indian title to occupancy is extinguished, if it should elect to do so, and that there has never been any time limit on the Indian occupancy, the theory of the Government in this case involves us in certain serious difficulties. There is, of course, no doubt that so long as the state was sparsely settled lieu lands could be easily selected for the small tracts that would be lost in the manners specified, but the loss of sections 16 and 36 in large tracts of unceded Indian country, where the Indian title might not be extinguished for many years, would render it practically impossible for the state to obtain proper indemnity lands. The contention that they should be as contiguous as may be would

have only a remote application to the situation, and the contention of the act of 1826 that the lieu lands should be selected from the same land district could not be fulfilled at all. We think it was clearly never within the contemplation of Congress that the state should lose its school lands throughout such a vast district as is here contended for. Furthermore, it is apparent that if the state should elect to wait and take sections 16 and 36 in the country occupied by the Indians at the date of the survey, the delay might stretch over many years. In all human probability, after the lapse of, say, fifty years, the public domain, excepting that occupied by the Indians, would have been conveyed away by the United States, and in that event the state would have to look to these specific sections for its school lands, or go without. If it is to be understood, then, that the United States meant to retain the power to dispose of sections 16 and 36, freely, and for any purpose which Congress might see fit to regard as a public use, then it will be seen that the original grant to the state might turn out to be of no value however. In other words, the point which the state makes is just this: If, placing reliance upon the pledge of sections 16 and 36, the state should elect to wait for the extinction of the Indian title, it is reasonable to suppose that there would come a time when the disposal by the Government of these sections would throw the state back upon its paper right to select lieu lands when there would be no lieu lands to select. The state would then find itself the possessor of a worthless grant.

We do not believe that the possibility of such a situation could have been in the contemplation of Congress and the people of Minnesota when the contract was made. We believe that the only reservations with respect to these lands were, first, that in favor of bona fide preëmptors and purchasers under the town-site act, and second, that in favor of such governmental uses as might be found to be necessary in the course of the natural growth of the country. Whatever view may be taken of the power of Congress to render the state grant worthless, still the presumption against the exercise of such a power by Congress is so strong that doubtful language would hardly be held to compass such an intention.

Respectfully submitted,

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